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In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1955

NO. 494

CHARLES T. CROWDER,
Appellant
v.
COMMONWEALTH OF VIRGINIA,
at the relation of the
STATE CORPORATION COMMISSION,
Appellee

GEORGE H. ELLIS,
Appellant
v.
COMMONWEALTH OF VIRGINIA,
at the relation of the
STATE CORPORATION COMMISSION,
Appellee

STATEMENT AS TO JURISDICTION WITH APPENDIX

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APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 15 of the Rules of the Supreme Court of the United States, as amended, appellants submit

herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the Supreme Court of Appeals of Virginia in this cause.

(a) Opinion Below:

The opinion of the Supreme Court of Appeals of Virginia appealed from was rendered June 13th, 1955, and is reported in 197 Va. 96, 87 S. E. (2d) 745. A copy of the opinion is attached hereto as Appendix A.

(b) Grounds on Which Jurisdiction is Invoked:

(i) These causes originated in the State Corporation Commission of Virginia upon citation to each of appellants to show cause why each should not be fined and his right to operate motor vehicles over the highways of Virginia suspended or revoked under Section 58-642 of the Code of Virginia,—not in issue here—, for refusal to pay gross receipts road taxes of two per centum assessed pursuant to Section 58-638 of the Code of Virginia (set forth verbatim below), arising from the sole and exclusive carriage of United States mail by motor vehicle by agreement with, and under direction of, the Postmaster General, returnable May 10th, 1954. From the decisions of the Commission holding appellants amenable to the tax and assessing a fine of $250.00 each, unless the taxes asserted to be due be paid on or before September 3rd, 1954, appellants appealed as of right to the Supreme Court of Appeals of Virginia.

(ii) The Supreme Court of Appeals of Virginia sustained the order of the Commission, by judgments entered June 13th, 1955. Notice of appeal was filed in the Supreme Court of Appeals of Virginia September 2nd, 1955.

(iii) The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Section 1257(2) of the Judicial Code and Judiciary (28 U. S. C. 1257(2)), as the decision was rendered by the highest court of the State of Virginia in which a decision could be had, and there was drawn in question the validity of Section 58-638 of the Code of Virginia on the ground of its being repugnant to the Constitution of the United States, Art. I, Sec. 8, Clauses 3 and 7, and the decision was in favor of its validity.

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review the judgment by appeal in this cause: *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69 (1946); *Cities Service Gas Co.* v. *Peerzation*, 340 U. S. 179 (1950); *Dean Milk Co.* v. *City of Madison, Wis., et al.*, 340 U. S. 349 (1951); *Niemotko* v. *State of Maryland*, 340 U. S. 268 (1951); *Western Maryla id Railway Co.* v. *Rogan*, 340 U. S. 520 (1951); *California State Auto. Ass'n Inter-Insurance Bureau* v. *Maloney, Inc. Commissioner*, 341 U. S. 105 (1951); and *Hughes* v. *Fetter, et al.*, 341 U. S. 609 (1951).

(v) The validity of Section 58-638 of the Code of Virginia of 1950, Vol. 8, page 513, is involved and its text is as follows:

> "Except as hereinafter otherwise provided, every person who operates, or causes to be operated, on any highway in this State, any motor vehicle, trailer or semi-trailer for the transportation of property for compensation, whether for rent, or for hire, or as a contract carrier, or as a common carrier, and every common carrier by motor vehicle, trailer or semi-trailer of pas-

sengers, shall pay quarterly to the State Treasurer, on or before the fifteenth day of April, July, October and January of each year, in addition to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, and upon the operation thereof, and in addition to any motor fuel tax paid or payable by such person, a road tax calculated on the gross receipts derived from such operations during the quarter year ending with the preceding month, according to the following schedule:

"(1) Two per centum of the gross receipts derived by such person from all intrastate operations; and

"(2) Two per centum of such proportion of the gross receipts derived by such state operations by the vehicles of such person on the public highways of this State bears to the total number of miles traveled in interstate operations by the vehicles of such person both within and without this State, including miles traveled on streets in cities and towns embraced within the highway system of this State, but exclusive in each case of the miles traveled in this State on any street maintained exclusively by any city or town.

"All taxes so collected shall be credited to the highway maintenance and construction fund.

"The provisions of this section shall apply for the tax year beginning January first, nineteen hundred forty-nine, and annually thereafter until otherwise provided by law."

(c) The Question Presented By This Appeal:

The federal question presented to the State Corporation Commission, the Supreme Court of Appeals of Virginia

and on this appeal is:

Whether the Commonwealth may tax the gross receipts from the sole and exclusive carriage of United States mail by motor vehicle over the highways of Virginia under authority of Section 58-638 of the Code of Virginia.

(d) Statement of The Case:

Appellants are residents and taxpayers of Virginia and each has been engaged over a long number of years solely and exclusively in the transportation of United States mail by motor vehicles over the highways of Virginia from the Cities of Norfolk and Suffolk, Virginia, to various postal destinations in Virginia and North Carolina, and return with like burden, by separate agreements with the Postmaster General, cancellable at his will.

The routes and schedules are fixed, and may be altered, by the Postmaster General from time to time, and the entire operations are subject to the provisions of the Postal Laws and Regulations, and consequently subject to order of the Postmaster General. Neither is engaged in any other business, nor transports any other property of any nature. Each employs his operators, pays social security, provides Virginia license plates, pays tax on gasoline in Virginia, pays property taxes on the vehicles used and has no exemption plate or certificate of public convenience and necessity. Neither has ever been called upon to pay gross receipts taxes or file any reports arising out of his operations until January 1954.

The Commonwealth then audited the accounts of appellants, ascertained Crowder to be indebted under Section 58-638 of the Code in the amount of $3,200.70, for the

period beginning January 1st, 1951, through December 31st, 1953, inclusive of penalty and interest to January 22nd, 1954, arising out of the operation of motor vehicles carrying United States mail over the highways of Virginia. A like assessment differing only in amount was made against George H. Ellis.

Appellants refused to pay the assessments so made and each was summonsed before the State Corporation Commission, pursuant to Section 58-635 of the Code of Virginia, to show cause why each should not be fined and his right to operate motor vehicles over the highways of Virginia suspended or revoked under Section 58-642 of the Code, retu nable May 10th, 1954.

At the hearing the appellants moved to strike the evidence of the Commonwealth on the ground that the Commission was without jurisdiction in the premises, in that the appellants were engaged in the performance of a Governmental function in operating motor vehicles solely and exclusively in the carriage of United States mail.

The Commission overruled the appellants' motion and on June 25th, 1954, rendered judgment that each appellant be fined the sum of $250.00, and costs, unless on or before September 3rd, 1954, each pay the gross receipts road tax asserted by the Commonwealth to be due (Appendix B).

From the decision in each case the appellants appealed to the Supreme Court of Appeals of Virginia.

The issue as to invalidity of the tax was raised on appeal in the Assignment of Error and statement of Question involved, set forth in appellants' opening brief, as required

by Rule 5.11 of the Rules of the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals of Virginia, in its opinion rendered June 13th, 1955, held that Section 58-638 of the Code was not repugnant to the Commerce and Postal Clauses of the United States Constitution, (Article I, Section 8, clauses 3 and 7), since appellants were independent contractors and not exempt from the tax imposed by Section 58-638 of the Code, despite the exclusive jurisdiction of Congress over post roads and post routes. (Appendix A).

Appellants are appealing from that decision on the constitutional issue stated.

(e) Grounds Upon Which It Is Contended That The Federal Question Presented Is Substantial:

The Commonwealth attempts to draw a line between gross receipts from intrastate and interstate carriage of mail. There can be no such distinction. Mail is either domestic or foreign. In either case it is immune from interference of any nature by the several states, consequently the adverse rulings of the Supreme Court of Appeals of Virginia (Appendix A) being repugnant to Article I, Section 8, Clauses 3 and 7, of the United States Constitution, were such as to bring these cases within the jurisdictional provision relied on and the cases cited in support thereof (subparagraph (b) (iv), *supra*).

A like question has never presented to any Court heretofore and the reasons why the question presented is so substantial as to require plenary consideration for its resolution appear above and follow.

It will be observed that under Section 58-638, *supra*, the

tax is two per centum of the gross receipts upon the *operations* of a motor vehicle for transportation of property "*in addition* to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, *and upon the operation thereof*, and *in addition* to any motor fuel tax paid or payable by such person, *a road tax calculated on the gross receipts derived from such operations* * * *." (Italics supplied).

It is strictly then a tax on the privilege of the use of the highways and a tax on gross income from the transportation of mail thereover and falls in the same or higher category as gross income derived from transportation of interstate commerce, because the carriage of mail is strictly a Governmental function exclusively federal. The freedom of the mails is a vital and indispensable part of the economic life and political existence of the United States. The powers to keep the channels of interstate commerce open and to provide for the uninterrupted and continuous carriage of United States mail were cardinal considerations in the adoption of our Constitution.

The tax here is not upon the property used in carrying out a Governmental function, but upon operations required therefor, hence upon the operation itself, and constitutes a burden thereon.

A tax upon the *property* used in the carriage of the mail in connection with the operations of a common carrier was held to be valid in *Alward* v. *Johnson*, 282 U. S. 539, 51 S. Ct. 273, 75 L. Ed. 495, but that case did not consider, nor by inference could it be said to be any authority for, a tax upon the gross income derived from the carriage of United States mail, or the privilege to use the highways therefor.

This Court has consistently distinguished between a tax upon property and the agency, or means, used to carry out a Government operation, so long as the tax did not affect the operation itself, but in no case has this Court ever held a tax upon the gross income derived from performing an intimate necessary Governmental function to be valid.

It has also ever been careful to protect interstate commerce, *a fortiori*, should it protect the carriage of the United States mail from a tax which may, by the ukase or ill-advised Legislation of some State, subject it to a tax burdensome in carrying out of the Governmental function itself.

In *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (328-329), this Court in discussing the significant difference between a tax measured by gross receipts and one measured by net income said:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

Conceivably, and probably, if the Commonwealth of Virginia can lay a tax upon the gross receipts from the carriage of the United States mail—and such carriage does not depend on whether it is interstate or intrastate—then the way is open to every State in the Union to lay a similar tax and thereby drive the highway transportation of mail from the roads.

It may be well for the Commonwealth to argue that the State is entitled to charge transporters of mail for the use of the highways. The same argument could be advanced for the transportation of any Government property, cannons, ammunition, mail, supplies, money, currency, or the operation of any vehicle, until each State became a port of entry.

This argument is fallacious and without merit in that all Federal aid to highways stems from the Federal Aid Act of July 11, 1916, c. 241, 39 Stat. 355, and from the Act of November 9, 1921, c. 119, which is entitled "An Act To amend the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented, and for other purposes," and from this Act to the present Acts, constituting Federal aid to highways, (Title 23, U. S. C. A.) all such aid has been provided by the Federal Government as could reasonably be required of it to pay its way for the use of State highways for postal service and transport.

It cannot be said then that the State is equitably or legally entitled to any contribution by levy upon the gross receipts from the carriage of United States mail over the highways.

As stated, there are no cases concerning tax upon the

gross income from the carriage of United States mail, but those cases dealing with a tax upon the privilege of engaging in interstate commerce and hence upon the carriage itself are apropos. If this Court has held that interstate commerce is exempt from direct tax on gross receipts derived from interstate commerce, with even greater force it should hold invalid a direct tax on gross receipts from the carriage of United States mail.

There are numerous cases in which a tax, on *gross* receipts and a similar tax on the carriage of persons and property have been held to be *privilege*,—and consequently an invalid,—tax rather than property tax.

In *New Jersey Bell Telephone Co.* v. *New Jersey*, 280 U. S. 338 (1930), a telephone company, part of the business of which was in interstate and foreign commerce, was taxed *ad valorem* on its real and personal property and was subjected to a franchise tax of 5% of the gross receipts apportioned to New Jersey. The statute called the tax a *franchise* or privilege tax, and the state sought to support it as a tax on *property* represented by the value of the company's franchise. The Court held that it was not a property tax:

> "We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void. *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 345. *Galveston, H. & S. A. R. Co.* v. *Texas, supra*, 227. *Meyer* v. *Wells, Fargo & Co.*, 223 U.S. 298. *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335. *Crew Levick Co.* v. *Pennsyl-*

vania, 245 U. S. 292, 295, 297. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329. *Pullman Co.* v. *Richardson, supra.*" (p. 349)

Of especial significance is *American Barge Line Co.* v. *Koontz,* 68 S. W. (2d) 56 (W. Va. 1951), in which the Supreme Court of that State held that an annual *privilege* tax based on *gross* income from the business of transporting passengers and freight by steamboat was clearly a *privilege* tax on interstate commerce in contravention of the Commerce Clause of the Federal Constitution. This case represents the reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at bar and so presents a conflict between the respective Supreme Courts of the two states which should be resolved by this Court so that uniformity of taxation will be achieved.

In *Ohio Tax Cases,* 232 U. S. 576 (1914), the Supreme Court held that a tax on gross intrastate earnings of railway companies, in addition to the taxes on their property, was a *privilege* or *occupation* tax and not a *property* tax, and in *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298 (1912), a gross revenue tax on public service corporations, including express companies, was held not to be a tax upon the property of express companies.

The Supreme Court of Appeals of Virginia held that appellants were independent conrtactors and therefore amenable to the tax, but whether they are independent contractors or not is beside the point, if, in fact, the appellants were engaged in the performance of a Governmental function. The tax is upon this Governmental function or a tax upon using the highways of Virginia for the performance thereof, or a tax upon the gross receipts derived therefrom, since to

hold otherwise would result in the tax being upon the contract itself.

The appellants are not independent contractors, however, because their contract must be performed under the supervision and control of the Postmaster General, whose duties in this respect are performed by the Second Assistant Postmaster General, and the services performed must be in accordance with postal laws and regulations.

One is an independent contractor when he may perform the services and do the work contracted for as befits him, or suits his purpose, or convenience, and to whom the master only looks for results. This is the very antithesis of the postal contract in issue since the appellants are always within the jurisdiction and under the direction, control and supervision of the Post Office Department as to routes, methods, schedules, time and every phase of the operation, and in so engaging appellants are functionaries of the United States Government. See *Fleming* v. *Commonwealth,* 191 Va. 288. See also *Aetna Ins. Co.* v. *Ill. Central R. Co.,* 6 N. E. (2d) 189, 365 Ill. 303, reversing 283 Ill. App. 527, Certiorari granted, 57 S. Ct. 939, 301 U. S. 679, 91 L. Ed. 1338. Certiorari dismissed, 58 Sup. Ct. 269, 302 U. S. 652, 82 L. Ed. 505.

The Supreme Court of Appeals of Virginia was misled by *Alward* v. *Johnson, supra,* in which it confused a property tax with a gross income tax upon operations. Having reached the wrong premise it ended with the wrong conclusion.

(h) A copy of the opinion of the Supreme Court of Appeals of Virginia is appended as Appendix A.

A copy of the opinion of the State Corporation Commission is appended as Appendix B.

(i) A copy of the judgments of the Supreme Court of Appeals of Virginia is appended as Appendix C.

It is respectfully submitted that Section 58-638 of the Code of Virginia is in contravention of Article I, Section 8, Clauses 3 and 7 of the Constitution, in that it provides for a tax which is essentially one on the privilege of operating motor vehicles over the highways of Virginia in performance of a Federal Governmental function; that it is in its essence a tax upon gross receipts from the carriage of United States mail, both intrastate and interstate, and therefore burdensome, and a tax upon the agreement itself between appellants and the Postmaster General. We believe that the question presented by the appeal is substantial, of serious public importance and fully justifies a review by the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX A

Present: Hudgins, C. J., Eggleston, Spratley, Buchanan, Miller and Smith, JJ.

Record No. 4380.

CHARLES T. CROWDER

v.

COMMONWEALTH OF VIRGINIA, EX REL. STATE CORPORATION COMMISSION

Record No. 4381.

GEORGE H. ELLIS

v.

COMMONWEALTH OF VIRGINIA, EX REL. STATE CORPORATION COMMISSION

OPINION BY JUSTICE C. VERNON SPRATLEY, Richmond, Va., June 13, 1955.

FROM THE STATE CORPORATION COMMISSION

These cases, here on appeals from the State Corporation Commission of Virginia, as a matter of right, present the question whether the gross receipts road tax provided under § 58-638,* Code of Virginia, 1950, may be imposed on ap-

* § 58-638. "Except as hereinafter otherwise provided, every person who operates, or causes to be operated on any highway in this State, any motor vehicle, trailer or semi-trailer for the transportation of property for compensation, whether for rent, or for hire, or as a contract carrier, or as a common carrier, and every common carrier by motor vehicle, trailer or semi-trailer of pas-

pellants who operate motor vehicles on the highways of Virginia for the transportation of United States mail for compensation.

It was agreed before the State Corporation Commission that the cases be heard together and that a decision on one would be determinative of the other. The record contains the evidence and exhibits relating to the operations of Charles T. Crowder. The facts are not in dispute.

The appellant, Crowder, a resident of Virginia, operates ten motor vehicles over the highways of Virginia exclusively in the transportation of United States mail for com-

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sengers, shall pay quarterly to the State Treasurer, on or before the fifteenth day of April, July, October and January of each year, in addition to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, and upon the operation thereof, and in addition to any motor fuel tax paid or payable by such person, a road tax calculated on the gross receipts derived from such operations during the quarter year ending with the preceding month, according to the following schedule:

"(1) Two percentum of the gross receipts derived by such person from all intrastate operation; and

"(2) Two percentum of such proportion of the gross receipts derived by such person from all interstate operations as the total number of miles traveled in interstate operations by the vehicles of such person on the public highways of this State bears to the total number of miles traveled in interstate operations by the vehicles of such person both within and without this State, including miles traveled on streets in cities and towns embraced within the highway system of this State, but exclusive in each case of the miles traveled in this State on any street maintained exclusively by any city or town.

"All taxes so collected shall be credited to the highway maintenance and construction fund.

"The provisions of this section shall apply for the tax year beginning January first, Nineteen hundred forty-nine, and annually thereafter until otherwise provided by law."

pensation, from and to points in Virginia and North Carolina. He owns the motor vehicles and selects and employs their drivers. He fixes the wages and hours of his employees, prescribes their duties, and controls their time of employment. He purchases the necessary fuel, lubricants and license tags for his vehicles. Neither he nor any of his employees are covered by the United States Civil Service, or Retirement System. He performs his duties under written contracts with the United States, which provide compensation in an annual sum, payable monthly. The routes to be traveled, the schedules to be followed, and the terminii to be served are specifically set out. Provisions for cancellation, renegotiation, and for extra compensation, should any service in addition to that specified be necessary, are prescribed. Neither of the appellants holds a certificate of necessity and convenience as a common carrier.

The appellants contend that since under the provisions of the U. S. Constitution (Article I, Section 8), Congress has assumed exclusive jurisdiction over post roads and post routes and has provided for carrying the mail (U. S. C. A., Title 39, Chapter 14), the transportation of mail is exclusively a Federal Government function, and cannot be burdened with taxation by the several States. Consequently, they claim that since they are engaged solely in the carriage of mail upon terms and conditions fixed by the Postmaster General of the United States, they are engaged in a purely governmental function, and, therefore, not subject to the imposition of the tax. They argued before the Commission, as they do here, that the burden of a gross receipts road tax levied on their gross receipts falls, in fact, on the Federal Government. In support of their contentions, they invoke certain decisions in the field of interstate commerce, where taxes upon such commerce have been held to be an unconstitutional burden.

The State Corporation Commission assessed Crowder with gross receipts road taxes in the sum of $3,200.70 for the period beginning January 1, 1951, through December 31, 1953, including penalty and interest to January 22, 1954. It assessed George H. Ellis with similar taxes in the sum of $1,214.45 for the same period, including penalty and interest.

Appellants do not question the amount of the taxes assessed, if their operations be subject to the taxes.

A review of the decisions of the Supreme Court discloses that "the trend of its decisions is not to extend governmental immunity from state taxation and regulations beyond the National Government itself and governmental functions performed by its officers and agents." *Penn Dairies* v. *Milk Control Com.*, 318 U. S. 261, 270, 87 L. Ed. 748, 63 S. Ct. 617.

The question here involved is similar to that before the Supreme Court of the United States in *Alward* v. *Johnson*, 282 U. S. 509, 75 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9. There the plaintiff was engaged in operating an automotive stage line between two points in California, and carried the mail by motor vehicles under a contract with the Post Office Department. Two-thirds of his gross receipts, upon the whole of which he was taxed, were derived from carrying the mails, the remainder from transporting passengers and freight. In upholding the right of California to collect a 5% gross receipts tax levied and collected exclusively for highway purposes, the Court said:

"Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon

the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely. *Union P. R. Co.* v. *Peniston,* 18 Wall 5, 30, 21, L. Ed. 787, 791; *Metcalf* v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172. The facts in *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 72 L. Ed. 857, 56 A. L. R. 583, 48 S. Ct. 451, and *New Jersey Bell Teleph. Co.* v. *State Bd. of Taxes & Assessments,* 280 U. S. 338, 74 L. Ed. 463, 50 S. Ct. 111, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here." (282 U. S. at 514, 75 L. Ed. at 499).

While in that case the carrier transported passengers and freight, as well as mail, and here the carriers transport mail exclusively, there can be no difference in legal principle because of the difference in the subjects of transportation, or in the proportion of the receipts derived therefrom. Immunity from taxation is not based upon the character of the subject transported or upon the apportionment of a taxpayer's income.

It will be noted that the Court distinguished the case of *Panhandle Oil Co.* v. *Mississippi, supra,* relied upon by appellants, in which it had been held that the State could not levy any excise tax on gasoline sold to the United States.

In *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208, the Court held that West Virginia could levy an occupation tax upon the gross receipts paid by the United States to a building contractor on work performed within the limits of that State. The court there said:

"The tax is not laid upon the Government, its property or officers.

* * *

"The tax is not laid upon any instrumentality of the Government. * * * Respondent is an independent contractor. The tax is non-discriminatory. (302 U. S. at 149).

* * *

"Respondent has no constitutional right to immunity from non-discriminatory local taxation and the mere fact that the tax in question burdens respondent is no defense. The defense is that the tax burdens the Government and respondent's right is at best a derivative one. He asserts an immunity which, if it exists, pertains to the Government and which the Government disclaims.

* * *

"In *Alward* v. *Johnson,* 282 U. S. 509, 75 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9, *supra,* as already noted, the tax was upon gross receipts and these were derived from a contract for carrying the mails, but the tax was upheld. If there appeared that the tax was in lieu of taxes upon the property and had been treated by the State Court as a property tax. But if the tax as actually laid upon the gross receipts placed a direct burden upon the Federal Government so as to interfere with the performance of its functions, it could not be saved because it was in lieu of a tax upon property or was so characterized." (302 U. S. at 158, 82 L. Ed. at 171).

Referring to the facts of the case under review, this was said:

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax

may validly be laid. * * * The fact that the tax on the gross receipts of the contractor in the *Alward case, supra,* might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity." (302 U. S. at page 160).

The *Panhandle case, supra,* was overruled rather than distinguished in the later case of *Alabama* v. *King and Boozer,* 314 U. S. 1, 86 L. Ed. 3, 62 S. Ct. 43, where the State was allowed to collect a sales tax on building material sold to contractors constructing an Army camp for the United States under a "cost-plus fixed-fee" contract. In that case Mr. Chief Justice Stone said:

"The Government, rightly, we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co.* v. *State ex rel. Knox, supra; Graves* v. *Texas Co., supra,* we think it no longer tenable. (314 U. S. at 8, 9, 86 L. Ed. at 6). (Citing cases).

* * *

"The added circumstances that they were bound by their

contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James* v. *Dravo Contracting Co.*" (314 U. S. at 14, 86 L. Ed. at 9).

Cf. *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 82 L. Ed. 907, 58 S. Ct. 623; *Sollitt* v. *Com.*, 161 Va. 854, 172 S. E. 290.

In *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342, 93 L. Ed. 721, 69 S. Ct. 561, the State of Oklahoma was allowed to collect a tax on the gross value of production and an excise tax on each barrel of petroleum produced from lessees of Federal held Indian lands. In that case the Court reviewed its holdings over many years relative to the limit of governmental immunity, and overruled five of its earlier decisions. In support of its conclusion, the Court said:

"Equally significant was *Alward* v. *Johnson*, 282 U. S. 509, 514, 75 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9, which sustained a state tax measured by gross receipts on the property of a stage line engaged in carrying the mails." (336 U. S. at page 359).

Appellants refer to and cite *Railway Express Agency* v. *Commonwealth of Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558. That case is not in point here. It involves the imposition of a privilege tax under Code, § 58-546 and § 58-547; whereas the tax imposed under Code, § 58-638 is a tax levied on carriers of property for use of the public highways of the State.

Appellants also cite and rely upon a number of decisions from other courts which tend to support their contention. Those decisions, however, represent views which have been distinguished, modified or reversed by later cases. Our views are in harmony with the later decisions of the Supreme Court, as we understand them.

The tax imposed under Code, § 58-638 is a road use tax. It is not levied on the entire gross receipts of the interstate carrier; but only upon that percentage of its gross receipts that the number of miles operated over Virginia highways bears to the total number of miles traveled in interstate operations. It is collected and credited to the Highway Maintenance and Construction Fund, and its validity as a tax imposed for the use of State highways by an interstate carrier is now well settled. *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702; *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs.*, 332 U. S. 495, 92 L. Ed. 99, 68 S. Ct. 167; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. Ed. 1053, 70 S. Ct. 806; *Bode* v. *Barrett*, 344 U. S. 583, 97 L. Ed. 567, 73 S. Ct. 468; *The Adley Express Co.* v. *Commonwealth of Virginia*, 196 Va. 1007, 86 S. E. 2d 818.

Under the language of the Act, the tax applies to "every person who operates, or causes to be operated, on any highway in this State, any motor vehicle, trailer or semi-trailer for the transportation of property for compensation, whether for rent or hire, or as a contract carrier, or as a common carrier, * * *." This language needs no interpretation.

The appellants carry the mail under written contracts between them and the Postmaster General of the United States, acting under the authority and conditions imposed by

Congress (U. S. C. A., Title 39, Chapter 12). They are not officers or employees of the Federal Government or of any of its departments. They are independent contractors doing certain prescribed work for the Government at fixed compensation. As such the usual rules governing the construction of contracts applies to contracts for carrying the mails. 41 Am. Jur., Post Office, § 78, page 753; 72 C. J. S., Post Office, § 27e, page 302.

The terms and conditions of the contracts are merely specifications indicative of the service to be performed and not of the character of the agency by which they are performed.

However extensively the Government may have reserved the right to specify and control the actions of the contractors in carrying the mail, neither the reservation or exercise of that power gave to the contractors the status of a representative or agent of the Government. They were and are merely obligated to do certain specified work at a fixed compensation, and enjoy no official capacity.

For the foregoing reasons, the final order of the State Corporation Commission in each of the cases is affirmed.

Affirmed.

APPENDIX B

Case No. 12023.

RULE

It appearing that the defendant has failed to pay Gross Receipts Road Taxes indicated due in the amount of $3,-200.70, for the period January 1, 1951, through December 31, 1953, including penalty and interest to January 22, 1954, as imposed by Section 58-638 of the Code, it is

ORDERED that the defendant appear at 10:00 o'clock, a.m., on May 10, 1954, in the courtroom of the State Corporation Commission in the State Office Building in Richmond, Virginia, and show cause, if any can be shown, why he should not be fined and why his rights to operate over the highways of Virginia should not be suspended or revoked under Section 58-642 of the Code.

The rule shall be served on the defendant and a copy sent to the Division of Motor Carrier Taxation.

A True Copy
Teste:

N. W. ATKINSON, Clerk of the
State Corporation Commission.

* * *

Case No. 12024.

RULE

It appearing that the defendant has failed to pay Gross Receipts Road Taxes indicated due in the amount of $1,-214.45 for the period January 1, 1951, through December

31, 1953, including penalty and interest to January 23, 1954, as imposed by Section 58-638 of the Code, it is

ORDERED that the defendant appear at 10:00 o'clock a.m., on May 10, 1954, in the courtroom of the State Corporation Commission in the State Office Building in Richmond, Virginia, and show cause, if any can be shown, why he should not be fined and why his rights to operate over the highways of Virginia should not be suspended or revoked under Section 58-642 of the Code.

The rule shall be served on the defendant and a copy sent to the Division of Motor Carrier Taxation.

A True Copy
Teste:

N. W. ATKINSON, Clerk of the
State Corporation Commission.

* * *

In Re: Rule for Non-Payment of Gross Receipts Taxes.

Present: Commissioners Ralph T. Catterall (Chairman), W. Marshall King. (Chairman Catterall Presiding.)

Appearances: Thomas L. Woodward and Frank A. S. Wright, Counsel for Charles T. Crowder.

Frederick T. Gray, Assistant Attorney General, Commonwealth of Virginia.

W. C. Seibert, Commerce Counsel for the Commission.

Date of Hearing, May 10, 1954.

Mr. Seibert: May it please the Commission, this is a Rule against Charles T. Crowder, of Suffolk, Virginia, alleging failure to pay Gross Receipts Road Taxes in the amount of $3,200.70, covering the period January 1, 1951, through December 31, 1953, including penalty and interest to January 22, 1954.

Service was made upon Mr. Crowder by Deputy Sheriff of the County of Nansemond, Virginia, on the 13th day of March, 1954.

Mr. Stuart, will you take the stand, please.

ALBERT STUART, JR.,
a witness introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Seibert:

Q. Will you give your name and position with the Commission, please?

A. Albert Stuart, Assistant Director, Division of Motor Carrier Taxation.

Q. Are you charged with the duty to see that all carriers who operate for compensation over the highways of the State of Virginia pay Gross Receipts Taxes, file their reports and pay taxes?

A. Yes, sir.

Q. Do you have investigations made of the operations of these carriers from time to time?

A. I do, sir.

Q. Did you have an investigation made of the opera-

tions of Mr. Charles T. Crowder, of Suffolk, Virginia?

A. Yes, sir.

Q. Will you explain when that investigation of his accounts was made and what was the result of the investigation?

A. Mr. Julian H. Osborne, one of the field representatives of the Department of Motor Carrier Taxation, made an audit of the accounts on January 13, 1952, and ascertained the amount of taxes due.

Mr. Woodward: We object to that unless he is here.

Mr. Seibert: Are you in charge of that office?

A. Yes.

Q. Is Mr. Osborne under your direct supervision?

A. Yes.

Q. Did he make that audit under your supervision?

A. Yes.

Q. And following your authority and direction?

A. Yes, sir.

Mr. Seibert: In view of the objection of Mr. Woodward, I would like to state that this audit was made by one of the members of the staff under the direction of Mr. Stuart.

Mr. Woodward: We object to it. We have the right to cross examine the man who made the audit.

Chairman Catterall: Do you claim that the audit is erroneous?

Mr. Woodward: I don't claim either way, but I claim that we are entitled to cross examine the one who made it.

Chairman Catterall: I am somewhat taken by surprise, Mr. Woodward, because Mr. Crowder was in and talked to Judge Hooker and me and made no objection to the

amount of the audit but only as to the legal grounds.

Mr. Woodward: Maybe we can agree on it.

Mr. Seibert: We can have Mr. Osborne here.

Chairman Catteral: Is he in town?

Mr. Seibert: Yes.

Mr. Woodward: Suppose we admit the Exhibit, subject to a later cross examination.

Chairman Catterall: Will someone get Mr. Osborne over here and this will be filed as Exhibit I subject to check.

Mr. Seibert:

Q. What date was this audit made?
A. Made on February 2, 1954.

Q. Are you sure of that?
A. No, January 13, 1954.

Q. January 13, 1954, the audit was made by Mr. Julian H. Osborne?
A. Yes.

Q. What does that audit show is due by Mr. Crowder in Gross Receipts Road Taxes?
A. $3,200.70, including penalty and interest.

Q. How much of it was in tax?
A. $2,902.66.

Q. For what period was the audit made and for what period were the taxes due?
A. January 1, 1951 to December 31, 1953.

Q. What does this audit reflect was the reason for the tax?
A. The carrier failed to file reports and pay any taxes during the period.

Q. What sort of operation is Mr. Crowder engaged in?
A. It appears in the audit that he is engaged in the transportation of United States mail.

Q. Do you know how that mail is being transported?
A. No, sir.
Mr. Woodward: We concede that it is being transported by motor vehicle.

Mr. Seibert:

Q. Is he employed directly by the United States Government or is he employed under contract?

Mr. Woodward: We concede that he is employed by contract.

Mr. Seibert:

Q. Do you know how much of an operation Mr. Crowder has?
A. No, except from the audit by his gross receipts.

Q. You don't know how many pieces of equipment he has?
A. No.

Mr. Woodward: We concede that he is operating ten motor vehicles in the carriage of United States mail exclusively.

Mr. Seibert:

Q. Has Mr. Crowder filed his reports at any time?
A. No, sir.

Q. Was he informed of the requirements?
A. Apparently he was not.

Q. Was the audit the first time he was checked as to operation?
A. It was.

Q. Was he sent a questionnaire?
A. Not prior to the date of the audit.

Q. Is Mr. Crowder a common carrier, do you know?

Mr. Woodward: That is a legal question.

Mr. Seibert: It is not a legal question. He holds a certificate from the Commission.

Mr. Woodward: What is a common carrier and what a contract carrier is a legal question.

Mr. Seibert:

Q. Does Mr. Crowder hold a certificate of public convenience and necessity as a common carrier from the State Corporation Commission?

Mr. Woodward: We object to the question and any answer.

Chairman Catterall: Ask the question, Does he hold a certificate of public convenience and necessity issued by the Commission.

Mr. Woodward: We concede he does not.

Mr. Seibert:

Q. What type of equipment does he have, do you know?
A. No, sir.

Q. Was this audit the first information Mr. Crowder had regarding this bill for taxes?
A. So far as my file indicates, it is.

Q. When was that sent to him?
A. Apparently it was delivered to Mr. Crowder on February 4 when he appeared in conference with the Commission, at which time Mr. Osborne was present.

Q. He was informed February 4 from your statement?

A. Yes, sir.

Q. Did you handle after that in an effort to collect these taxes?

A. I have a memorandum from Mr. Osborne who was present at the conference with the Commission and Mr. Crowder in which he states:

"A conference was held and Mr. Crowder given an opportunity to pay the amount by March 5, 1954, and as of March 8, 1954, the amount had not been paid and I referred the matter to you for collection."

Q. And the Rule was issued March 10. Has any payment been made on it up to the present time?

Mr. Woodward: We concede that it has not.

A. No, sir.

Mr. Seibert: I believe that is all.

Chairman Catterall: After you delivered a copy of that audit, Exhibit I, did he tell you or write you that the amounts shown by the audit were erroneous?

A. No, sir.

Chairman Catterall: You may cross examine.

CROSS EXAMINATION.

By Mr. Woodward:

Q. What is your official position?

A. Assistant Director of the Division of Motor Carrier Taxation.

Q. Do you contend that Mr. Crowder carries anything but United States mail?

A. There is no information that has come to my atten-

tion that he does.

Q. Your contention is that he is amendable to taxation in the State of Virginia on the carriage of United States mail exclusively?

A. In effect, yes, sir. Our contention is that he operates for compensation.

Mr. Seibert: That is all I have.

Chairman Catterall: You may stand aside.

Witness stood aside.

Mr. Woodward: I move to strike the evidence of the Commonwealth put in by the Department of Taxation on the grounds that this Commission is without jurisdiction in the premises for this reason:

That the carriage of United States mail is a governmental function and Mr. Crowder by carrying United States mail is an employee of the United States Government for stated compensation, that he is not a contract carrier and not a common carrier.

Chairman Catterall: What did you mean when you said he was employed under contract?

Mr. Woodward: That is a mere method of fixing his compensation. He is still a direct employee of the United States Government.

Chairman Catterall: Have you a copy of his contract?

Mr. Woodward: I will furnish that if the Commission overrules my motion at this time. There is no case where I can find, if there are they have escaped me, in which it has been held that any state can levy any tax on the carrying of United States mail or on any United States Governmental employee in its Governmental function. That is our

position and we believe that Mr. Crowder is not subject to taxation in his employment in carrying mail and that the Commission is without jurisdiction.

Chairman Catterall: Have you read that memorandum that I gave Mr. Wright last week?

Mr. Woodward: I am familiar with the Atwood case. The Atwood case deals with the stage line or truck line which carries other commodities which was done along with the carriage of mail and, therefore, because of the carriage of those commodities came under the purview of the Commission and to some extent it is scoffed at because it is not possible to tax the mail itself.

I do not have the citation with me but in one case it was held that to avoid the payment of taxes, all the employees had to do was to allocate certain vehicles to the carrying of United States mail.

Chairman Catterall: Is that a State case or Federal case?

Mr. Woodward: It is a State case. It is an Indiana case. I would be glad to furnish it to the Commission along with the memorandum, if you wish. It is a new case and the authorities are somewhat lean but in the case of Jersey Telephone Company v. Knox, it was held that there could be no tax levied against that part of the Telephone Company that was allocated to the United States Government, and in another case it was held that you could not tax gasoline that was used by the United States Government, and I find no case where this Commission can levy taxes against vehicles that carry United States mail, and I offer for the record the contract that Mr. Crowder has with the Government.

Chairman Catterall: You wish to file that as Exhibit 2?

Mr. Woodward: Yes, sir.

Mr. Seibert: Is it conceded that Mr. Crowder has Virginia license plates and has secured from the Commission any exemption plates or classification plates?

Mr. Woodward: We have no exemption plates and none applied for.

Mr. Seibert: Do you have any Virginia license plates?

Mr. Woodward: Yes, and we pay taxes on all gasoline.

Mr. Seibert: And he purchases license plates from the Division of Motor Vehicles?

Chairman Catterall: We had better develop the evidence further and the Commission will overrule your motion. Mr. Osborne is here if you want him for cross examination.

Mr. Woodward: We think we can dispense with that. We will call Mr. Crowder.

CHARLES T. CROWDER,

a witness introduced in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Woodward:

Q. You are Mr. Charles T. Crowder residing in the City of Suffolk?

A. Yes, sir.

Q. Do you hold certain contracts with the United States Government for the carriage of United States mail?

A. Yes, sir.

Q. Over what routes do you operate?

A. Suffolk to Danville; Norfolk to Petersburg; Norfolk to Rocky Mount (twice); and Norfolk to Muden.

Q. I hand you certain memorandum or letters dated June 22, 1953 and signed by Mr. J. C. Allen, Assistant Postmaster General, on the stationery of the Post Office Department, and ask you whether or not this is an allocation of route numbers and termini of the routes you now operate and have operated for sometime past with United States Government, the Post Office Department?

Mr. Gray: Will you read the question, please.

Note: Question read as follows:

"Q. I hand you certain memorandum or letters dated June 22, 1953, and signed by Mr. J. C. Allen, Assistant Postmaster General, on the stationery of the Post Office Department, and ask you whether or not this is an allocation of route numbers and termini of the routes you now operate and have operated for sometime past with the United States Government, the Post Office Department"?

Mr. Woodward: If you would let me read it into the record, I will be glad to do so.

Mr. Gray: I think it should be filed.

Mr. Woodward: We will file all of these. There are five that deal with the routes as follows:

No. 14549, Part A: Danville to Suffolk; Part B: Danville to Boydton; Part C: Danville to Emporia; Part D: Emporia to Suffolk.

Route No. and Termini:

14586, Norfolk to Munden, Virginia.

Route No. and Termini:

14585, Norfolk to North Petersburg Railroad Station (Atlantic Coast Line) Virginia.

Route No. and Ternini:

18537, Norfolk to Rocky Mount Railroad Station.

Route No. and Termini:

18102, Norfolk, Virginia to Rocky Mount Railroad Station and I would like to offer these.

Chairman Catterall: They are received as Exhibit No. 2.

Mr. Woodward:

Q. You operate ten motor vehicles exclusively in the carriage of United States mail?

A. Yes.

Q. From whom do you receive your pay?

A. United States Government, Postmaster General.

Q. I notice on two of the letters that they refer to "Rocky Mount", but not the state. Is that Rocky Mount, North Carolina?

A. Yes, sir.

Q. On these vehicles do you carry anything but United States mail?

A. No, sir.

Q. How long have you been engaged in this business?

A. I can hardly recall, about thirty years, I imagine. It has been a long time.

Q. Have you ever been called upon by the State of Virginia to pay any taxes or file any reports until the time you were asked about it in January?

A. No, sir, never heard anything about it.

Q. Have you any regular schedule in your operation?

A. Yes, sir, I have to have one.

Q. And do you have definite routes?

A. Yes, sir.

Q. Who fixes the routes and schedules?

A. That is fixed out of Washington, the Postmaster General.

Q. And you have to comply with what they say in order to hold your contracts?

A. Yes, sir.

Q. Where do you buy your gasoline?

A. Different places.

Q. Do you pay the regular gasoline tax to the Motor Vehicle Department?

A. Yes, sir.

CROSS EXAMINATION

By Mr. Gray:

Q. I would like for you to look at Exhibit 2, your authority by which you operate, and tell us whether all of those bear the same date?

A. These three all have the same date.

Q. They are the ones for Virginia routes?

A. Yes.

Q. And these two are North Carolina routes?

A. The first three are the Virginia routes and the second two are the North Carolina routes, and I believe the dates are different on those two. One runs out ahead of the other.

Q. How many vehicles are involved?

A. Ten.

Q. Obviously, you don't operate all of them yourself?

A. No, I have drivers.

Q. Who pays the drivers?

A. I pay them.

Q. You fix their salaries?
A. Yes, sir.

Q. Are they covered by Federal Social Security?
A. Yes, sir.

Q. Do you haul anything else other than mail?
A. No, sir.

Q. Do you carry newspapers also?
A. I carry newspapers in the mail.

Q. Just those that are mailed?
A. That is right.

Q. Do you have complete control over your employees, do you hire them and fire them yourself?
A. Yes.

Q. I understand that your counsel has answered for you that you do have Virginia classification plates on your cars?
A. Oh, yes.

Q. And you made application to the State Corporation Commission for these plates?
A. No, sir, some inspector came down and said we had to put them on, and I told him that I didn't know why, that I had never had to do that as I only carry the mail and have never had to buy them and he said, "You are going to buy them today", and I said, "If I am going to buy them, I'm going to", and he said, "Fill out the papers".

Q. Do you get copies of your contracts with the Federal Government?
A. What do you mean?

Q. These letters state that the contract has not been renewed but will be renewed?
A. Yes.

Q. Do you have a copy of the contract?
A. No, that is in Washington.

Chairman Catterall: Don't they give you a copy?

A. No, sir.

Q. How do you know what you do?
A. I get schedules.

Mr. Gray:

Q. How do you get these contracts, on bids?
A. No, they used to do it on bids but now they bargain with us.

Q. What do you mean by "bargain"?
A. They know whether or not I have given good service and so they ask me if I want it again.

Q. What is the basis of the mileage? Is the pay on mileage basis?
A. We figure it different ways.

Q. How do you arrive at what you get out of it?
A. When I first bid on it, it was a certain bid and later on they renewed them, and you send in your application and get an increase if you can, and sometimes they will give you an increase and sometimes they won't.

Q. Take one contract, do you get a flat fee for the year?
A. So much per year per month.

Q. For the use of your vehicles?
A. Yes, sir, I suppose so, that is it.

Q. You have to pay your own help, provide your own cars and your own insurance?
A. Yes.

Q. Are you covered by Federal Civil Service?
A. No, sir.

Q. And you don't have Federal Retirement?
A. No, sir, not that I know of.

Q. These contracts run for four years?
A. Yes, and are renewable, four years and renewable. We used to have to bid on them.

Q. You have to bid after four years?
A. No, you don't have to bid on them now.

Q. At the termination of the four years the Government can cancel the contract and take it away from you?
A. They can take it at any time.

Q. And you don't have any Federal retirement?
A. They pay your month's salary.

Witness stood aside.

Mr. Woodward: I would like to renew my motion and argue it at this time.

Chairman Catterall: Do you want to argue it or file a brief?

Mr. Woodward: I think it would be more satisfactory to the Commission to file a brief.

Chairman Catterall: When would you like to file the brief?

Mr. Woodward: I would like to have as much as three weeks.

Chairman Catterall: Do you want to file a brief and then argue it or argue it and then file a brief?

Mr. Woodward: I will submit a brief and argue it now or after the brief is filed.

Chairman Catterall: Do you want us to set a date for argument and have the brief filed before that date?

Mr. Woodward: Either way that suits the Commission. I would rather file the brief and then set a date to argue it.

Chairman Catterall: Suppose you file your brief on the first day of June and then we'll have to get the black book to see about the date for argument.

Mr. Woodward: Might we agree that Mr. Ellis' case falls within the same category and should be decided in accordance with the decision in this case.

Chairman Catterall: Yes.

Mr. Seibert: I wonder if counsel will agree that I file proof of service as well as the audit and that the correct amount is $1,214.45, and all facts relating thereto are in accordance with this matter.

Mr. Woodward: We concede that the computation is correct on the taxes. Whether the application of the penalty and interest are proper, we can argue it with the Commission later.

Chairman Catterall: Then briefs will be filed on the first of June.

Mr. Gray: I think it would be most helpful to all parties if we could get a copy of the contract.

Mr. Woodward: If I can get a copy, I will be glad to file it.

Chairman Catterall: I think it would be helpful, and we will reserve Exhibit 3, and after you get it, if you will mail it in, we will appreciate it. Can you get that in within a week?

Mr. Woodward: I don't think so. We have to write and then it has to go through several Postmasters and the Postmaster General and so on.

Chairman Catterall: We seem to have June 1st as an open date. If you can get your briefs in by May 29th, we could have it argued on June 1st.

Mr. Woodward: How about the Commonwealth's brief. We would like for them to have their brief in before we argue it.

Chairman Catterall: You don't want simultaneous briefs?

Mr. Woodward: I think it would be more helpful if they filed their brief.

Chairman Catterall: Suppose the Commonwealth files its brief on the 17th of May, if you want him to file it first. The Commonwealth will file on the 17th of May and the Defendant on the 29th of May, and the case will be set down for argument on June 1st, Tuesday, at 10:00 a.m.

* * *

In Re: Rule for Non-Payment of Gross Receipts Road Taxes.

Present: Commissioners, Ralph T. Catterall (Chairman), W. Marshall King, (Chairman Catterall Presiding).

Appearances: Thomas L. Woodward and Frank A. S. Wright, Counsel for George H. Ellis.

Frederick T. Gray, Assistant Attorney General, Commonwealth of Virginia.

W. C. Seibert, Commerce Counsel for the Commission.

Date of Hearing May 10, 1954.

Note: The following agreement was had in regard to this case during the hearing of the case of Mr. Charles T. Crowder:

"Mr. Woodward: Might we agree that Mr. Ellis' case falls within the same category and should be decided in accordance with the decision in this case.

"Chairman Catterall: Yes.

"Mr. Seibert: I wonder if counsel will agree that I file proof of service as well as the audit and that the correct amount is $1,214.45, and all facts relating thereto are in accordance with this matter.

"Mr. Woodward: We concede that the computation is correct on the taxes. Whether the application of the penalty and interest are proper, we can argue it with the Commission later."

Chairman Catterall: Exhibit I will be filed in evidence.

* * *

On May 10, 1954, came on for hearing the rule of the Commission awarded against Charles T. Crowder for failure to pay gross receipts road taxes, Chairman Catterall and Commissioner King sitting, with Commissioner Hooker present at the argument.

Appearances were as follows:

Thomas L. Woodward and Frank A. S. Wright for the defendant. Frederick T. Gray for the Commonwealth and William C. Seibert for the Commission.

The Commission is of the opinion that the defendant is subject to the payment of gross receipts road taxes, and it is,

ORDERED:

1. That Charles T. Crowder be, and he hereby is, fined the sum of $250.00 and costs unless on or before September 3, 1954 he pays gross receipts road taxes in the amount of

$3,200.70 for the period from January 1, 1951, through December 31, 1953, including penalty and interest to January 22, 1954.

2. A copy of this order shall be sent to all counsel and a copy sent to the Division of Motor Carrier Taxation.

A True Copy,
Teste:

N. W. ATKINSON, Clerk of the
State Corporation Commission.

* * *

On May 10, 1954, came on for hearing the rule of the Commission awarded against George H. Ellis for failure to pay gross receipts road taxes, Chairman Catterall and Commissioner King sitting, with Commissioner Hooker present at the argument.

Appearances were as follows:

Thomas L. Woodward and Frank A. S. Wright appeared as counsel for the defendant. Frederick T. Gray appeared for the Commonwealth and William C. Seibert appeared for the Commission.

The Commission is of the opinion that the defendant is subject to the payment of gross receipts road taxes and it is,

ORDERED:

1. That George H. Ellis be, and he is hereby, fined the sum of $250.00 and costs unless on or before September 3, 1954, he pays gross receipts road taxes in the amount of $1,214.45 for the period from January 1, 1951, through December 31, 1953, including penalty and interest to January 23, 1954.

2. A copy of this order shall be sent to all counsel and a copy sent to the Division of Motor Carrier Taxation.

A True Copy,
Teste:

N. W. ATKINSON, Clerk of the
State Corporation Commission.

* * *

Opinion, CATTERALL, Commissioner:

These two cases raise the same question of law and were heard on a single record.

The question is whether a contract carrier of mail is liable for the gross receipts road tax imposed by § 58-638 of the Code on every person who operates on any highway in this State any motor vehicle for the transportation of property for compensation.

These taxpayers do so operate, and they claim immunity from the tax solely on the ground that they are performing a governmental function.

There is not a word in the Constitution of the United States dealing with this question. In the early days of the Republic, when states felt strongly about states' rights, some of them tried to tax out of existence the Bank of the United States. To meet the challenge, Chief Justice Marshall pronounced the doctrine of implied federal immunity from State taxation in *McCulloch* v. *Maryland*, 4 Wheaton, 316, and the limits of that doctrine have been the subject of debate ever since. The reason there is so much room for argument is that the doctrine is not based on the language of the fundamental law but on what the Supreme Court Justices, or a majority of them, think is good policy. For many years they thought it was good policy to forbid the

central government to tax the salaries of state officials and to forbid the state governments to tax the salaries of federal officials.

Virginia's gross receipts road tax is a tax for using the highways. It is imposed on business men whose business is conducted on state property. It is what is called a third-structure tax. For many years all states have imposed gasoline taxes and license plate taxes on motor vehicles. In recent years some states have imposed various kinds of additional taxes for the use of the highways. There can be no constitutionally relevant difference between a gasoline tax, a license plate tax and a gross receipts road tax. A carrier of mail who did not have to pay any of those three taxes could enter a lower bid to the government for his contract to carry the mail. If he did not have to pay a state income tax on his net income earned from carrying the mail, he could make a lower bid. If he did not have to pay social security taxes on his employees, he could make a lower bid. His bid has to be high enough to cover all the expenses of doing the business. Crowder and Ellis do not claim immunity from any of the taxes paid by other motor vehicle carriers except the gross receipts road tax.

A contractor carrying the mail is not performing a governmental function any more than a contractor building a post office or a contractor furnishing munitions or food to the army.

Since 1903, the railroads of Virginia have paid a gross receipts tax on their transportation receipts including receipts derived from carrying the mail.

In *Alward* v. *Johnson,* 282 U. S. 509 (1931) the Supreme Court decided the question here involved, and held that California could collect a 5% gross receipts tax from motor vehicle carriers who carried mail. It happened that the

carrier in that case derived only two-thirds of his revenue from his contract to carry mail, and Crowder seeks to distinguish that case on the ground that there is a constitutional difference between two-thirds and three-thirds. On principle, there can be no difference between one case and the other. If payments received from the government are immune from state taxation, they are immune because they are payments from the government, and not because they constitute the taxpayers' entire income. The Alward case has been used by the Supreme Court in two later cases to uphold state excise taxes on the activities of government contractors.

In *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), the state was allowed to collect a tax of $135,761.51 upon the gross amounts paid by the United States to a building contractor. At page 152, the court said:

"In *Alward* v. *Johnson*, 282 U. S. 509, 514, 75 L. (ed.) 496, 499, 51 S. Ct. 273, 75 A. L. R. 9, the Court sustained a state tax upon the gross receipts of an independent contractor carrying the mails. The taxpayer operated an automotive stage line. Two-thirds of his gross receipts, upon the whole of which he was taxed were derived from carriage of United States mails and the remainder from carriage of passengers and freight. The Court found that the property used in earning these receipts were devoted chiefly to carrying the mails and that without his contract with the Government the stage line could not be operated profitably. In upholding the tax upon his gross receipts we distinguished *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218 L. (ed.) 857, 48 S. Ct. 451, 56 A. L. R. 583, supra, saying: 'There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely * * * The facts in *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 72 L. (ed.)

857, 48 S. Ct. 451, A. L. R. 583, and *New Jersey Bell Telep. Co.* v. *State Bd. of Taxes and Assessments*, 280, U. S. 338, 74 L. (ed.) 463, 50 S. Ct. 111, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here.'"

And at page 160:

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract."

* * *

"The fact that the tax on the gross receipts of the contractor in the *Alward case*, 282 U. S. 509, 75 L. (ed.) 496, 51 S. Ct. 273, 75 A. L. R. 9 supra, might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity."

In *Oklahoma Tax Commission* v. *Texas Company*, 336 U. S. 342 (1949), the court allowed the state to collect two taxes, a tax on the gross value of production and an excise tax on every barrel of petroleum produced, from lessees of Indian lands. In order to uphold these taxes the court had to overrule five of its earlier decisions.

As an authority for overruling those decisions, the court relied on the Alward case, saying (p. 359):

"Equally significant was *Alward* v. *Johnson*, 282 U. S. 509, 514, 75 L. (ed.) 496, 499, 51 S. Ct. 273, 75 A. L. R. 9, which sustained a state tax measured by gross receipts on the property of a stage line engaged in the carrying the mails."

In the Alward case, the court distinguished *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218 (1928), in which it had held that the state could not collect its gasoline tax on the sale of gasoline to the United States. The Panhandle Case was overruled rather than distinguished in *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941), in which the state was allowed to collect a sales tax on lumber used to build an army camp by a contractor who furnished the lumber on a cost-plus basis.

In *Penn Dairies* v. *Milk Control Commission,* 318 U. S. 261 (1943) the court said (p. 269):

"We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio* v. *Thomas,* 173 U. S. 276, 43 L. (ed.) 699, 19 S. Ct. 453; *Johnson* v. *Maryland,* 254 U. S. 51, 65 L. (ed.) 126, 41 S. Ct. 16; *Hunt* v. *United States,* 278 U. S. 96, 73 L. (ed.) 200, 49 S. Ct. 38; *Arizona* v. *California,* 283 U. S. 423, 75 L. (ed.) 1154, 51 S. Ct. 522. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions."

At page 270:

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents."

And at page 277 the court stated that it considered that the Panhandle Case had been overruled by *Alabama* v. *King & Boozer,* and in *Kern-Limerick, Inc.* v. *Scurlock,* 98 L. (ed.) (Advance p. 313) (1954), the dissenting Justices accused their brethren of overruling King & Boozer. Thus

the debate on intergovernmental immunity goes on and will continue to go on. But the area of controversy has moved a long way from the question with which we are concerned in the case at bar. There is no disagreement among the Supreme Court Justices, that a tax imposed on a government contractor (and not directly on the United States) is constitutional. The majority in Kern-Limerick said (p. 321):

"Thus, King & Boozer is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States."

And supported that statement of the law with the following footnote:

"See *Oklahoma Tax Com.* v. *Texas Co.*, 336 U. S. 342, 365, 93 L. (ed.) 721, 738, 69 S. Ct. 561: 'True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption.'"

It is settled law that a government contractor is not immune from a state tax even if he passes on to the United States the exact burden of the tax pursuant to the provisions of a cost-plus contract. Crowder and Ellis do not do that, because they have lump-sum contracts and not cost-plus contracts. They are liable for the gross receipts road tax; and the constitutional point they have raised does not, at this late date, present a debatable question.

HOOKER AND KING, Commissioners, concur.

* * *

APPENDIX C

VIRGINIA,

IN THE SUPREME COURT OF APPEALS held at the Court Library Building, in the City of Richmond on Monday the 13th day of June, 1955.

Charles T. Crowder, Appellant,

against Record No. 4380

Commonwealth of Virginia, ex rel., State Corporation Commission, Appellee.

Upon an appeal of right from and supersedeas to an order of the State Corporation Commission entered on the 25th day of June, 1954.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore adjudged, ordered and decreed that the said order be, and the same is hereby, affirmed, and that the appellant pay to the appellee thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

Appellee's costs:

Attorney's fee	$50.00
Printing brief	36.80
Total	$86.80

A Copy,
Teste:

H. G. Turner, Clerk.

APPENDIX C

VIRGINIA,

IN THE SUPREME COURT OF APPEALS held at the Court Library Building, in the City of Richmond on Monday the 13th day of June, 1955.

George H. Ellis, Appellant,

against Record No. 4381

Commonwealth of Virginia, ex rel., State Corporation Commission, Appellee.

Upon an appeal of right from and supersedeas to an order of the State Corporation Commission entered on the 25th day of June, 1954.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore adjudged, ordered and decreed that the said order be, and the same is hereby, affirmed, and that the appellant pay to the appellee thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

Appellee's costs:

Attorney's fee	$50.00
Printing brief	36.80
Total	$86.80

A Copy,
Teste:

H. G. Turner, Clerk.

NOV 18 195

In the

Supreme Court of the United States

October Term, 1955

No. 494

CHARLES T. CROWDER,
Appellant

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee

GEORGE H. ELLIS,
Appellant

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

J. LINDSAY ALMOND, JR.
Attorney General of Virginia

C. F. HICKS
Assistant Attorney General of Virginia

Supreme Court – State Library Building
Richmond 19, Virginia

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In the

Supreme Court of the United States

October Term, 1955

No. 494

CHARLES T. CROWDER,

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GEORGE H. ELLIS,

Appellant

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the question presented by this appeal, files this Statement in Opposition to the appellants' statement as to jurisdiction. The appellee

includes its motion to dismiss the appeal or affirm the order below on the ground that the federal questions raised on behalf of the appellants are so unsubstantial as to obviate further argument. The matters here relied upon are more particularly stated below.

I.

The State Statute Involved and the Nature of the Case

A.

THE STATUTE

The appellants contend that § 58-638 of the Code of Virginia as applied to them is repugnant to the Constitution of the United States. That section of the Code of Virginia reads as follows:

> "Except as hereinafter otherwise provided, every person who operates, or causes to be operated, on any highway in this State, any motor vehicle, trailer or semi-trailer for the transportation of property for compensation, whether for rent, or for hire, or as a contract carrier, or as a common carrier, and every common carrier by motor vehicle, trailer or semi-trailer of passengers, shall pay quarterly to the State Treasurer, on or before the fifteenth day of April, July, October and January of each year, in addition to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, and upon the operation thereof, and in addition to any motor fuel tax paid or payable by such person, a road tax calculated on the gross receipts derived from such operations during the quarter year ending with the preceding month, according to the following schedule.
>
> "(1) Two percentum of the gross receipts derived by such person from all intrastate operation; and

"(2) Two percentum of such proportion of the gross receipts derived by such person from all interstate operations as the total number of miles traveled in interstate operations by the vehicles of such person on the public highways of this State bears to the total number of miles traveled in interstate operations by the vehicles of such person both within and without this State, including miles traveled on streets in cities and towns embraced within the highway system of this State, but exclusive in each case of the miles traveled in this State on any street maintained exclusively by any city or town.

"All taxes so collected shall be credited to the highway maintenance and construction fund.

"The provisions of this section shall apply for the tax year beginning January first, nineteen hundred forty-nine, and annually thereafter until otherwise provided by law."

B.

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

1. The appellants, Charles T. Crowder and George H. Ellis, are contract carriers of the United States mail by motor vehicle over the highways of Virginia and North Carolina.

2. The appellants furnish and operate several motor vehicles over the highways of Virginia, which vehicles are used solely to transport the United States mail. The appellants employ drivers for these trucks, pay them and fire them. They purchase the trucks, fuel and lubricants and license tags for the vehicles. Neither the appellants nor any of their employees are covered by the Federal Civil Service System or the Federal Retirement System.

3. The appellants are under contract for an annual sum to transport the mail. The contracts contain cancellation provisions, renegotiation provisions, and provisions for extra consideration should any service in addition to that specified in the contract be necessary. (A copy of one set of the contracts may be found in the Appendix to this Statement.)

4. The State Corporation Commission of the Commonwealth of Virginia assessed Charles T. Crowder with Gross Receipts Road Taxes in the sum of $3,200.70 for the period beginning January 1, 1951 through December 31, 1953, including penalties and interest to January 22, 1954. George H. Ellis was assessed with Gross Receipts Road Taxes in the sum of $1,214.45 for the same period, including penalties and interest.

5. This assessment was upheld in a decision of the State Corporation Commission after a hearing of the matter before the Commission on May 10, 1954.

6. On the 17th day of November, 1954, the Supreme Court of Appeals of Virginia awarded the appellants an appeal as a matter of right and supersedeas. The case was heard by the said Court on April 19, 1955. On June 13, 1955, the Supreme Court of Appeals of Virginia affirmed the order of the State Corporation Commission.

C.

THE QUESTIONS PRESENTED

1. Does the imposing of Virginia's Gross Receipts Road Tax upon the appellants constitute an unconstitutional interference or burden upon the Federal government and its postal system?

2. Does Virginia's Gross Receipts Road Tax (§58-638 of the Code of Virginia) impose an unconstitutional burden upon interstate commerce?

II.

Argument

A.

THE LEVY OF A GROSS RECEIPTS ROAD TAX UPON A CONTRACT CARRIER OF THE MAIL DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES OR ANY ACT OF CONGRESS.

The appellants are independent contractors and not officers or employees of the United States Post Office Department. There are written contracts between the appellants and the Postmaster General (see Appendix). These contracts for carrying the mails are let by the Postmaster General under the authority and conditions enacted by Congress. Chapter 12 of Title 39, U.S.C.A. This chapter makes it clear that the carriers are contractors and not employees or officers of the government. Federal principles governing the construction and operation of contracts apply to contracts for carrying the mails. *Huse* v. *U. S.*, 44 Ct. Cl. 19, aff'd. 222 U. S. 496; *U. S.* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414; 72 C. J. S. 302, Post Office, §27(e); 41 Am. Jur. 753, Post Office, §78.

A contract mail carrier, such as the appellants, is not a direct instrumentality of the government. He is a personal contractor, doing certain work for the government at a fixed compensation. *State* v. *Wiles*, 116 Wash. 387, 199 P. 749. See *State* v. *Boone*, 132 N. C. 1107, 44 S. E. 595; *Sawyer* v. *Corse*, 17 Gratt. (58 Va.) 230.

A contractor does not share any governmental immunity, even though the contract is the means by which the United

States secures construction of its post offices, or transportation of its mails. Cf. *James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94; *Baltimore & A. R. Co.* v. *Lichtenberg,* 176 Md. 383, 4 A. 2d 734, appeal dismissed 308 U. S. 525.

A review of the decisions of this Honorable Court discloses that "the trend of its decisions is not to extend governmental immunity from state taxation and regulations beyond the National Government itself and governmental functions performed by its officers and agents." *Penn Dairies* v. *Milk Control Comm.,* 318 U. S. 261, 270.

The question here involved is similar to that before this Honorable Court in *Alward* v. *Johnson,* 282 U. S. 509. In that case this Court unanimously held that a contract carrier of mail was subject to California's tax upon gross revenues derived from an automotive stage line, over two-thirds of which revenues was derived from carrying the mail. This gross revenue tax was in lieu of all property taxes. This Court held:

> "Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only, remotely. Union P. R. Co. v. Remiston, 18 Wall 5, 30, 21 L. ed. 787, 791; Metcalf v. Mitchell, 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172." (382 U. S. at 514).

In *Alward* v. *Johnson, supra,* this Honorable Court held that the property used by a contract carrier of mail was subject to state taxes and that the gross revenues derived from a contract with the Federal Government could be used

to determine the amount of these taxes. There is but one real difference between *Alward* v. *Johnson* and the instant case. In that case the tax was construed to be a tax on property measured by gross receipts, whereas, in the instant case, we have a highway use tax measured by gross receipts.

In *James* v. *Dravo Contracting Co.*, 302 U. S. 134, this Honorable Court adopted the clear and unequivocal doctrine that an independent contractor with the Federal Government was subject to all state taxes and regulations, unless Congress had specifically provided an exemption. This Court held that West Virginia could levy an occupation tax upon the gross receipts derived from a contract with the United States Government.

In an opinion by Mr. Chief Justice Hughes, this Court held:

> "The tax is not laid upon an instrumentality of the Government. * * * Respondent is an independent contractor. The tax is nondiscriminatory. (302 U. S. at 149)
>
> * * *
>
> "Respondent has no constitutional right to immunity from nondiscriminatory local taxation and the mere fact that the tax in question burdens respondent is no defense. The defense is that the tax burdens the Government and respondent's right is at best a derivative one. He asserts an immunity which, if it exists, pertains to the Government and which the Government disclaims.
>
> "In Alward v. Johnson, 282 U. S. 509, 75 L. ed. 496, 51 S. Ct. 273, 75 A. L. R. 9, supra, as already noted, the tax was upon gross receipts and they were derived from a contract for carrying the mails, but the tax was upheld. It there appeared that the tax was in lieu of taxes upon the property and had been treated by the

State Court as a property tax. But if the tax actually laid upon the gross receipts placed a direct burden upon the Federal Government so as to interfere with the performance of its functions, it could not be saved because it was in lieu of a tax upon property or was so characterized. (302 U. S. at 158).

* * *

"But if it be assumed that the gross receipts tax may increase the cost to the government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. * * * The fact that the tax on the gross receipts of the contractor in the Alward Case, supra, might have increased the cost to the government of the carriage of the mails did not impress the Court as militating against its validity." (302 U. S. at 160).

Thus we see that the only distinction between the instant case and *Alward* v. *Johnson, supra,* i.e., that the gross receipts tax was in lieu of all property taxes rather than a highway use tax, was abolished by this Honorable Court in *James* v. *Dravo Contracting Co., supra.*

Governmental immunity from state taxes and regulations does not extend to independent contractors, even if the tax is passed directly to the Federal government under a "cost-plus-a-fixed fee" contract, *Alabama* v. *King & Boozer,* 314 U. S. 1, or even if the taxes or regulations impose an increased economic burden on the Federal government. *Penn Dairies* v. *Milk Control Comm.,* 318 U. S. 261; *Oklahoma Tax Commission* v. *Texas Co.,* 336 U. S. 342; *Esso*

Standard Oil Co. v. *Evans,* 345 U. S. 495; Cf. *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376.

B.

VIRGINIA'S GROSS RECEIPTS ROAD TAX (SEC. 58-638 OF THE CODE OF VIRGINIA) DOES NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

The tax imposed under § 58-638 of the Code of Virginia is a highway use tax. It is not levied on the entire gross receipts of a carrier of interstate commerce; but only upon that percentage of its gross receipts that the number of miles operated over Virginia highways bears to the total number of miles traveled in interstate operations. It is collected and credited to the Highway Maintenance and Construction Fund. While the business of motor carriers was still in its infancy, this Honorable Court held that a state could tax interstate operations of a motor carrier as well as intrastate operations for the use of the state's highway system. *Hendrick* v. *Maryland,* 235 U. S. 610.

A state may levy a highway use tax on a motor carrier although it engaged exclusively in interstate commerce. *Clark* v. *Poor,* 274 U. S. 554. Such highway use taxes may be based on gross receipts so long as they do not discriminate against interstate commerce. *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs.,* 332 U. S. 495; *Capital Greyhound Lines* v. *Brice,* 339 U. S. 542; *Bode* v. *Barrett,* 344 U. S. 583.

The Commonwealth of Virginia uses the same method of apportioning gross receipts from interstate commerce for levying a highway use tax that this Honorable Court viewed with favor in *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653, 663.

CONCLUSION

For the foregoing reasons, the appellee respectfully submits this Statement showing that the questions upon which the decision in this case depends are so unsubstantial as to obviate further argument, and the appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the order of the court below.

Respectfully submitted,

J. LINDSAY ALMOND, JR.
Attorney General of Virginia

C. F. HICKS
Assistant Attorney General of Virginia

Supreme Court–State Library Building
Richmond 19, Virginia

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Appellee's Statement Opposing Jurisdiction and Motion to Dismiss to Alexander H. Sands, Esq., American Building, Richmond, Virginia, Frank A. S. Wright, Esq., Mutual Building, Richmond, Virginia and Thomas L. Woodward, Esq., Suffolk, Virginia, Counsel of record for the Appellant, on this the 17th day of November, 1955.

C. F. HICKS
Assistant Attorney General